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No. 96-1703

In the Supreme Court of the United States

OCTOBER TERM, 1996

BUSH & BURCHETT, INC., PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General

FRANCIS A. POMMETT, III
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Deputy Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

JUDITH D. HEIMLICH
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the Secretary of Labor properly exercised jurisdiction under the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, over violations of safety standards in the construction of a river bridge that connects a public road running from a surface coal mine to a loadout facility, on the ground that the bridge under construction was not a "mine" covered by the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is unpublished, but the decision is noted at 106 F.3d 400 (Table). The decision and order of the administrative law judge (ALJ) (Pet. App. 21-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1997. The petition for a writ of certiorari was filed on April 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, is administered by the Secretary of Labor through the Occupational Safety and Health Administration (OSHA), an agency

within the Department of Labor. The OSH Act establishes a comprehensive regulatory scheme designed "to assure so far as possible * * * safe and healthful working conditions" for "every working man and woman in the Nation." 29 U.S.C. 651(b). The OSH Act also authorizes the Secretary of Labor to conduct reasonable safety and health inspections, and to issue citations ordering the abatement of any violations and proposing civil penalties for such violations. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 445-446 (1977); 29 U.S.C. 654(a), 658(a), 659(a), 666(a)-(c). Civil penalties range up to $70,000 for each willful or repeated violation, and up to $7,000 for each serious or non-serious violation. 29 U.S.C. 666(a)-(c). The OSH Act does not apply, however, to "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

The Secretary of Labor also enforces the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, through the Mine Safety and Health Administration (MSHA), another agency within the Department of Labor. The purpose of the Mine Act is, among other things, to "improve[] health and safety standards to protect the health and safety of the Nation's coal or other miners," 30 U.S.C. 801(g), and it covers "[e]ach coal or other mine * * * and each operator of such mine." 30 U.S.C. 803. The Mine Act defines a "coal or other mine" to include "private ways and roads appurtenant to" a mine, 30 U.S.C. 802(h)(1)(B). The definition of "coal or other mine" also includes "lands, excavations, underground passageways, shafts, slopes, tunnels and workings,

structures, facilities, equipment, machines, tools or other property * * * used in, or to be used in, * * * the work of extracting such minerals * * * or the work of preparing coal," 30 U.S.C. 802(h)(1)(C). The "work of preparing the coal" is defined as including "storing, and loading of * * * coal." 30 U.S.C. 802(i).

2. On June 19, 1991, two employees of petitioner Bush & Burchett, Inc., were killed when two cranes collapsed during the construction of a bridge over the Guyandotte River in West Virginia. Pet App. 6, 23. Petitioner had contracted with Heartland Resources, Inc. (Heartland), to build the bridge, which was needed to connect a "haul road" running from a proposed coal mine site to a road on the other side of the river. *Id.* at 2-3. The latter road, in turn, led to a railroad loadout facility. *Ibid.* The distance between the proposed mine and the loadout facility is approximately 6.5 miles. *Id.* at 2 n.1.

Although Heartland owned the land spanned by the bridge and some portions of the road, it had entered into an agreement with the West Virginia Department of Transportation to convey the road and bridge, when completed, to the State, at which point they would become part of the state road system. Pet. App. 3 & n.3.[1] Because the road and bridge were intended for public use, a state supervisor was assigned to verify the materials for the bridge. *Id.* at 4. Heartland also promised to maintain the road and bridge in the future, in conformity with state requirements. The

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[1] The agreement indicated that the haul road would partially use the existing county road system. The agreement also included an obligation to upgrade the portion of the haul road that was already public and to construct the bridge and connecting roads. Pet. App. 3-4.

road and bridge were assigned a county route number and the West Virginia Highway Patrol polices them. *Ibid.*

The two deaths at the bridge construction site occurred during an attempt to place one of the bridge's beams on the caps of two bridge piers using two unevenly sized cranes. The cranes moved along timber mats placed on the river bank and were to simultaneously hoist the beam onto the pier. The procedure had to be aborted when the smaller crane began to lift off the ground because it was not close enough to the pier. Although the mat on which the smaller crane was traveling did not extend further, petitioner continued with the lift after leveling and compacting the ground in front of the mat. That work did not correct the problem, however, and the smaller crane's boom collapsed during the second attempted lift. As a result, the beam fell into the river, causing the boom of the larger crane to collapse onto the pier cap, killing the two men stationed there. Pet. App. 6-7.

3. After consulting with local MSHA officials, an OSHA compliance officer inspected the accident site; MSHA believed it did not have jurisdiction because the bridge was not a mine or a coal company facility. Pet. App. 5, 7.[2] Following a closing conference, OSHA issued citations for numerous serious and willful violations of safety standards, and proposed civil penalties totalling $243,500.[3]

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[2] Heartland also believed that MSHA did not have jurisdiction over the roads and bridge, since they were "built for the state." Pet. App. 5.

[3] OSHA conducted a second inspection of the bridge, in September 1991, after receiving a complaint by the local union

4. After petitioner filed a notice of contest with the Occupational Safety and Health Review Commission (Commission or OSHRC), an ALJ held bifurcated hearings on the jurisdictional and merits issues. Pet. App. 25-26. On July 13, 1994, the ALJ issued a decision and order on the jurisdictional issue. *Id.* at 21-41. Finding petitioner's argument that MSHA preempted OSHA's jurisdiction in this case to be "doubtful at best," the ALJ reasoned that "[t]he bridge was never meant to be private," and therefore did not fall within the definition of "coal or other mine" under Section 3(h)(1) of the Mine Act. Pet. App. 37; see 30 U.S.C. 802(h)(1)(B) (mine includes "private ways and roads"). The ALJ observed that the Mine Act "was not intended to apply to any activity engaged in by a mining company, regardless of that activity's relationship to the business of mining," and found not dispositive "[t]he fact that the bridge may have been in private hands during its construction." Pet. App. 40. The ALJ concluded that, even assuming that MSHA had authority to regulate petitioner's work practices, "it did not exercise any regulatory jurisdiction" in this case. *Id.* at 37; see 29 U.S.C. 653(b)(1). The Commission denied review. Pet. App. 2.

5. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-20. Although it acknowledged that the Mine Act's definition of a

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president that workers were being lifted on the tip of a crane boom to work stations under the bridge and that the workers were provided with no fall protection while they worked under the bridge at heights of up to 60 feet. That inspection resulted in the issuance of two more citations, one serious and one willful, for a proposed penalty of $100,000. Pet. App. 8, 25. Petitioner contested all of the citations issued during the two inspections, and the two cases were consolidated. *Id.* at 1.

"mine" is "sweeping," *id.* at 10 (quoting *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984)), the court held that the bridge in this case was not a "mine" over which MSHA had jurisdiction under the Mine Act.

The court rejected petitioner's argument that a road that was not "private" nevertheless could be a "mine" consistent with the inclusion of "private ways and roads appurtenant to such area" within the statutory definition. Pet. App. 11-12; see 30 U.S.C. 802(h)(1)(B). Petitioner's expansive reading of that clause, the court reasoned, was not compelled by its language and was "contrary to common sense." Pet. App. 12. "Otherwise," the court continued, there could "conceivably be no limit to MSHA jurisdiction, a result Congress clearly did not intend." *Ibid.* Furthermore, such a reading could lead to "bizarre results." *Ibid.* The court explained that petitioner's interpretation would lead to "duplicative jurisdiction" and cause "confusion" about which regulations applied to highway maintenance workers, the result of which could be a "decrease in safety." *Id.* at 12-13. Moreover, the court explained, miner safety "may not always be involved since not all public roadways appurtenant to" mines "are used in mining work." *Id.* at 13.

The court similarly rejected petitioner's alternative argument that the haul road and bridge were "private," within the meaning of 30 U.S.C. 802(h)(1)(B), because they had not been conveyed to the State at the time of the inspection. The court concluded that "[t]he record supports [the Commission's] finding that in this case, the bridge and roadway approaches should be considered 'public.'" Pet. App. 14; see *id.* at 14-15; compare *id.* at 37-40

(ALJ's findings). The court relied on "the ordinary meaning of a public road," which includes a "dedication." *Id.* at 15. The court understood the term "dedication," in turn, to mean the "devotion [of land] to a public use by an unequivocal act of the owner . . . manifesting an intention that it shall be . . . used presently *or in the future.*" *Id.* at 15-16 (quoting *Seltenreich* v. *Fairbanks*, 103 F. Supp. 319, 323 (D. Alaska 1952), aff'd, 211 F.2d 83 (9th Cir.), cert. denied, 348 U.S. 887 (1954)). Accordingly, "[t]he key to a dedication is the intent of the dedicator." Pet. App. 16. Here, the court found it "clear from the record that Heartland intended to dedicate the bridge and haul road to the state," as evidenced by its agreement with the state transportation department to convey the bridge and road and by its contract with petitioner that the bridge conform to state requirements. *Ibid.*

Finally, the court rejected petitioner's argument that even if the bridge were public, it still qualified as a mine because it was a "structure * * * or other property" that was "to be used in * * * the work of" extracting or preparing coal within the meaning of Section 3(h)(1)(C) of the Mine Act. Pet App. 16; see 30 U.S.C. 802(h)(1)(C). The court found unconvincing petitioner's analogy of the road and bridge to a conveyor belt that moves coal from within a mine, reasoning that a conveyor belt is more analogous to trucks that might carry the coal over the road, from the mine to the loadout facility. Furthermore, the court observed that, unlike a conveyor belt, which is "directly used in the 'loading' of coal," and therefore expressly included in the definition of "work of preparing the coal," 30 U.S.C. 802(i), the transporting of coal, for which the road and bridge are used, is

not separately identified by the Mine Act as a task involved in the work of preparing coal. Pet. App. 18. The court concluded that since "Congress specifically dealt with roads in § 802(h)(1)(B)," it was "not clear * * * that Congress intended to include roads within the meaning of 30 U.S.C. § 802(h)(1)(C)," Pet. App. 18, as "structures" or "other property" used in the work of extracting or preparing coal.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioner primarily argues (Pet. 18-19) that the court of appeals erred in affirming the Commission's finding that the bridge was not "private" and thus not a "mine" under 30 U.S.C. 802(h)(1)(B). The "private" or "public" nature of a worksite, however, is largely a question of fact. Under the OSH Act, "findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. 660(a). A reviewing court must uphold those findings if the evidence is adequate to support the conclusion. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951); see also *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992).

As the court of appeals concluded, "[t]he record supports OSHRC's finding that in this case, the bridge and roadway approaches should be considered public." Pet. App. 14. Petitioner's argument that the bridge was private rests on the slim reed that the road and bridge had not been formally conveyed to the State at

the time of OSHA's inspection. See Pet. 16, 18-19.[4] The court correctly rejected that contention in light of the principle that a public road includes one "dedicated" to future use by the general public. Pet. App. 15 & n.11. Here, substantial evidence supports the conclusion that the haul road and bridge were conceived and built as a public roadway. Heartland's application for a surface disturbance permit showed that the bridge and road construction would complete a contiguous county road system running from the mine to the loadout facility. *Id.* at 3. Heartland agreed to upgrade and build the road and bridge to state specifications and then to convey the completed project to the State. *Id.* at 4. Heartland did not view itself as permanently owning the bridge, and the road and bridge were assigned a public road number. *Id.* at 4, 5. Public access to the bridge was unrestricted, and it was patrolled by the state police. *Id.* at 4, 39-40. In light of that evidence, the court below was correct in affirming the Commission's finding that the bridge was not a private road, and thus did not fall within the statutory definition of a "mine." As a result, MSHA did not have "statutory authority" over the bridge, as would be required by Section 4(b)(1) of the OSH

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[4] Additionally, petitioner seems to suggest (Pet. 14, 19) that the word "roads" contained in the clause "private ways and roads appurtenant to" should be read to include public roads. We disagree. The most natural reading of that phrase is that "private" describes or modifies the word "roads" as well as the word "ways." Thus, Section 3(h)(1)(B) limits MSHA's enforcement authority to private travelways "appurtenant to" a mine. Reading Section 3(h)(1)(B) as petitioner suggests could "conceivably extend [MSHA jurisdiction] to unfathomable lengths," a result "Congress clearly did not intend." Pet. App. 12.

Act, 29 U.S.C. 653(b)(1), to displace OSHA's enforce ment authority. OSHA's exercise of jurisdiction was therefore proper.

2. Petitioner makes the additional argument (Pet. 20-24) that the bridge also falls within Section 3(h)(1)(C)'s definition of a "mine" because the bridge is integral to transporting the coal from the mine to the loadout facility, and thus qualifies as the "work of preparing the coal" as further defined under Section 3(i) of the Mine Act. 30 U.S.C. 802(i); Pet. App. 16-18.

As the court of appeals observed, "it is not clear from the statute or legislative history that Congress intended to include roads within the meaning of 30 U.S.C. § 802(h)(1)(C), since Congress specifically dealt with roads in § 802(h)(1)(B)." Pet. App. 18. In any event, the "work of preparing the coal" includes, as pertinent here, "storing[] and loading of * * * coal." 30 U.S.C. 802(i).[5] Petitioner, however, does not store or load coal, nor is the bridge itself to be used in the "storing" or "loading" of coal. Although coal is to be transported in trucks passing over the bridge, the transporting of coal is not a delineated task under 30 U.S.C. 802(i). Petitioner, as the builder of the bridge, simply does not perform any

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[5] Petitioner faults (Pet. 22-23) the court for not considering whether "transporting of raw coal" from the mine to the load-out facility is the "work of preparing the coal" because it is "work * * * usually done by the operator of the coal mine" under 30 U.S.C. 802(i). Petitioner does not transport coal, however, and it fails to explain why construction of a bridge to be used for that purpose would constitute work usually done by a coal mine operator.

function enumerated by the text of Section 3(i) as constituting the work of preparing coal.[6]

3. The road and bridge cannot reasonably be considered part of an "integrated" coal mining operation subject to the Mine Act, as petitioner argues. Pet. 23-24 (citing *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984)). The "physical proximity and operational integration" involved in *Carolina Stalite* between an adjacent stone quarry and gravel processing plant presented a vastly different "industrial and economic reality" than exists in the instant

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[6] In appropriate circumstances, some courts have held a conveyor belt that carries coal from a mine to a processing plant to be covered by the Mine Act. See, *e.g.*, *United Energy Servs., Inc.* v. *MSHA*, 35 F.3d 971, 975 (4th Cir. 1994) (employees servicing coal conveyor belt on mine property subject their employer to Mine Act coverage); *Pennsylvania Elec. Co.* v. *FMSHRC (Pennelec)*, 969 F.2d 1501, 1503 (3d Cir. 1992) (conveyor belt carrying coal from mine to processing station is used in work of preparing coal). To the extent petitioner analogizes the road and bridge to a conveyor belt (Pet. 22), however, the analogy is inapt, as the court of appeals recognized, Pet. App. 18, because the conveyor belt is comparable not to the stationary roadway, but to trucks that move the coal over the roadway from a mine to a processing facility. See, *e.g.*, *United Energy*, 35 F.3d at 975; *Stroh* v. *Director, OWCP*, 810 F.2d 61, 64-65 (3d Cir. 1987). The activities of employees who load or transport coal, even over public roads, may in some circumstances expose them to the hazards of mining. See 30 U.S.C. 801(a) ("first priority and concern" of the Mine Act "must be the health and safety of its most precious resource—the miner"). By contrast, petitioner's employees were exposed to the hazards of bridge construction, an activity that OSHA regulates extensively, see, *e.g.*, *Tri-State Steel Const., Inc.* v. *OSHRC*, 26 F.3d 173 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1355 (1995), and they engaged in no activity remotely involved in extracting or preparing coal.

case, in which a public bridge connects a six mile road running between a mine and loadout facility. Pet. 23; see 734 F.2d at 1548. Far more relevant to the instant case is the *Carolina Stalite* court's admonition, preceding the portion of the opinion quoted by petitioner (see Pet. 23-24), that "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." 734 F.2d at 1551.[7] And while the road and bridge in this case were perhaps selected as the sole means of transporting the coal (Pet. 21-22), they were not to be used solely for mining purposes.[8] Compare *United Energy*, 35 F.3d at 973 (Mine Act covers conveyor belt used exclusively in the work of preparing coal); *Pennelec*, 969 F.2d at 1503 (same).

4. Petitioner also asserts (Pet. 3, 21-24) that the court of appeals' decision puts it in conflict with several other circuits. That assertion is incorrect. The main conflict petitioner appears to perceive is that other courts, although on far different facts, have found Mine Act coverage and the court below did not. See, *e.g.*, Pet. 7 n.15. To the extent petitioner argues anything more, it appears to contend that the court below failed to apply certain "tests" used by other courts of appeals in determining Mine Act coverage, *e.g.*, broad construction (Pet. 21, 23), functional analy-

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[7] Indeed, the Third Circuit has held that reclamation work done on a coal silo at an abandoned coal preparation plant was not subject to MSHA's jurisdiction. *Lancashire Coal Co.* v. *Secretary of Labor*, 968 F.2d 388 (1992).

[8] Petitioner points to no authority for the proposition advanced here that property over which coal travels is thereby transformed into a mine subject to Mine Act coverage. Congress cannot be presumed to have intended to cover under the Mine Act every public road or railway leading to a mine.

sis (Pet. 21-22), plain meaning (Pet. 23), and an integrated plant standard (Pet. 23-24).

The court below did not expressly reject any analytical principle asserted here by petitioner. Indeed, the court employed the very principles of construction that petitioner espouses. For example, the court gave broad meaning to the word "mine," Pet. App. 10, and applied the plain language of the Mine Act, *e.g.*, *id.* at 18, but concluded in light of these principles that the bridge still did not fall within Section 3(h)(1)'s definition as either a private road or a structure or facility used in the work of preparing coal. The court also considered and rejected petitioner's argument that the road was part of "a unified, integrated coal mining operation." See Pet. App. 17. The court finally considered whether the "function" of the bridge fit within the plain meaning of the "work of preparing the coal," or qualified as the work of preparing coal by analogy to a coal conveyor belt, and concluded it did not. Pet. 21-22; Pet. App. 16-18. Consequently, rather than presenting any conflict, the decision of the court below applied established principles of statutory construction to the facts of the case.[9]

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[9] Nor does this case present any important question of federal law. See Pet. 25-28. While independent contractors may in some instances be faced with uncertainty as to whether they are covered by the Mine Act or the OSH Act, and possibly be subject to conflicting requirements under each, petitioner points to no such circumstances here. Petitioner does not contend that in constructing the bridge it attempted to comply with safety standards under either statute. Petitioner simply seeks to avoid the penalty imposed under the OSH Act by arguing that the Mine Act applied.

CONCLUSION

The petition for a writ a certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FRANCIS A. POMMETT, III
Attorney

J. DAVITT MCATEER
Acting Solicitor of Labor

ALLEN H. FELDMAN
Deputy Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

JUDITH D. HEIMLICH
Attorney
Department of Labor

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